

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS LYNCH,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 193964
Recorder's Court
LC No. 94-009984

Before: Holbrook, Jr., P.J., and Michael J. Kelly and Gribbs, JJ.

MEMORANDUM.

Defendant was convicted by a jury of assault with intent to commit criminal sexual conduct involving penetration, and was sentenced to serve an enhanced prison term of 5 to 15 years, reflecting his status as an habitual offender, third offense. He appeals by right, alleging, as he did in the trial court, that he was not arraigned on the habitual offender charges and that his counsel was ineffective in failing to advise him of the filing of such charges. We affirm.

The prosecutor filed notice of intent to seek enhancement of punishment under the recidivist statutes on September 30, 1994. This was subsequent to the effective date of 1994 PA 110, which eliminated the requirement that habitual offender proceedings be initiated by information, and instead prescribes that the prosecutor proceed by notice of intent to seek an enhanced sentence. MCL 769.13(2); MSA 28.1085(2). Accordingly, there was no requirement that defendant be arraigned, as there was no supplemental information on which to arraign him.

The lower court record contains a transcript of proceedings on September 30, 1994, at which time defendant was arraigned on the information and, according to the transcript, the prosecutor served on defense counsel by hand delivery a copy of the notice of intent to seek enhanced sentence. In an ex parte affidavit filed with his brief on appeal, defendant claims that he was not present at these proceedings and that the transcript inaccurately reflects what occurred. Defendant's affidavit is wholly incompetent; the record on appeal may not be enlarged in this fashion. *People v Taylor*, 383 Mich 338, 362; 175 NW2d 715 (1970). If the transcript is inaccurate, defendant has failed to pursue the available remedies for correcting it, which again do not involve naked assertions of erroneous

transcription in an appellate court. *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993). Furthermore, the lower court record reveals that, in addition to service of the notice of intent by hand delivery, a copy of the notice was mailed to defense counsel's office. A notarized proof of service to that effect appears in the lower court record. Even if the transcript of the September 30, 1994, proceedings were shown to be inaccurate, defendant would additionally have to show, by clear and convincing evidence, that the proof of service was false. *Delph v Smith*, 354 Mich 12; 91 NW2d 854 (1958). Defendant has not even attempted, however, to do so.

Defendant further contends that his trial counsel was ineffective in failing to advise him of the filing of the notice of intent by the prosecutor. However, defendant has failed to show how this prejudiced him in some cognizable way; no claim was made at sentencing, for example, that any of the prior convictions used for enhancement were inaccurate or invalid, nor was additional time to verify the validity of such convictions on any substantive basis requested. Accordingly, defendant has failed to establish the prejudice prerequisite to appellate relief on a claim of ineffective assistance of counsel, even assuming that his trial counsel was derelict in this respect. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly

/s/ Roman S. Gibbs